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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954

No. 352

HEARST CONSOLIDATED PUBLICATIONS, INC., *Petitioner*

v.

ROBERT R. STEVENSON, *Respondent*

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. DEMPSEY
Attorney for Petitioner

DEMPSEY AND KOPLOVITZ
938 Bowen Building
Washington 5, D. C.

McCAULEY AND HENRY
959 Eighth Ave.
New York, N. Y.
Of Counsel

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Your Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York for $75,000 in an action for damages caused by libel.

OPINIONS BELOW

The opinion of the Court below is unreported. It is reprinted in the Appendix to this Petition. The opinion of the District Court on Petitioner's motion for new trial is printed on page 445 of "Appendix to Appellant's Brief" which was the printed record in the Court below and which is being filed with the instant Petition.

JURISDICTION

The judgment of the Court below was rendered July 27, 1954. The jurisdiction of this Court is invoked under Title 28 United States Code 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the limited review which the Court below gave to the District Court's action denying Petitioner's motion for new trial deprived Petitioner of its right to have an appellate review of the errors assigned, and was inconsistent with the proper discharge of the Court's duty under Title 28, U.S.C., Section 2106.

STATEMENT

The basis of federal jurisdiction in the District Court was diversity of citizenship, the Respondent being a citizen of the state of New York and Petitioner being a Delaware corporation which publishes a newspaper in New York, New York. The litigation was instituted by an action for libel based on the publication in Petitioner's newspaper of an article recounting certain charges made against Respondent by his wife. The charges had been made by Respondent's wife in support of her motion for temporary alimony, counsel fee and a bill of particulars in a separation suit which she had served but not yet filed against Respondent in the New York Supreme Court.

By pre-trial order the District Court formulated the issue to be tried as follows:

> "To what extent was Plaintiff damaged by the publication of the article complained of? These issues include matters relevant and material to Plaintiff's claim for punitive damages."

During the trial numerous objections were made by Petitioner and exceptions taken to rulings of the Trial Judge. The Jury returned a verdict as follows: $1,000 general damages, $24,000 special damages, and $50,000 punitive damages.

Petitioner filed a motion for new trial on numerous grounds including the excessiveness of the verdict for special and punitive damages. This aspect of the motion for new trial was based upon the contention that the evi-

dence adduced at the trial could not as a matter of law support any verdict for special or punitive damages, and in any event the amounts awarded were grossly excessive in the circumstances of this case.

The District Court denied the motion for new trial, and in its appeal to the Court below, Petitioner assigned as error, in addition to numerous others, the abuse of discretion committed by the District Court in denying Petitioner's motion for new trial because of the excessiveness of the verdict for special and punitive damages.

The Court below considered, and in its opinion disposed of all assignments of error, except the assignment of error that the denial of Petitioner's motion for new trial on the grounds of excessiveness of the judgment was an abuse of the discretion of the Trial Judge, in the light of the facts evidenced in the record pertaining to the issue of special and punitive damages.

The view of the Court below was that regardless of the merits of Petitioner's contention that the evidence in the record required a ruling that the judgment for special and punitive damages was excessive, the Court below was powerless to grant Petitioner any relief from the judgment. The Court stated that it had exhausted its "limited power of review" when it had considered whether certain factors, not present in the instant case, had entered into the computation of the amount of damages awarded. In so restricting the scope of its appellate review, the Court below stated that it was following its long established practice

> *"not to enter upon a consideration of whether the trial judge should have so appraised the facts evidenced in the record as requiring an exercise of his discretionary power to grant a new trial either with or without a conditional remittitur by plaintiff of part of the verdict".*

(Opinion pp. 12-13 of Appendix, emphasis supplied)

An assignment of error that the evidence adduced at the trial bearing upon the issue of special and punitive

damages could not as a matter of law support the amount of the judgment was held by the Court below as falling outside the scope of its permissible review as a federal appellate court.

REASONS FOR ALLOWANCE OF WRIT

1. The decision of the Court below, with respect to the limitations on its power to determine whether the District Court abused its discretion in denying a new trial on the grounds of excessive damages, is in conflict with decisions of Courts of Appeals in other Circuits on the same matter. The effect of this self-imposed limitation by the Court below was to deprive Petitioner of any opportunity to correct the abuse of discretion committed by the Trial Judge in denying Petitioner's motion for new trial. In other Circuits litigants are afforded such an opportunity. The existence of a conflict among the Circuits on so important a matter calls for the exercise by this Court of its appellate jurisdiction to resolve the conflict so that litigants may receive justice uniformly throughout the federal judicial system.

The Court below cited earlier decisions of that Court to support its "long established practice". The earliest of these cases is *Miller* v. *Maryland Casualty Co.*, 2 Cir., 40 F. (2d) 463, in which Judge Learned Hand speaking for the Court in 1930 said at page 464:

> "The practice of this court has been uniform to refuse to consider any orders denying new trials, with the exception of Harrison v. U. S. (C.C.A.) 7 F. (2d) 259, which followed Mattox v. U. S., supra. New York & T. S. S. Co. v. Anderson (C.C.A.) 50 F. 462; Denison v. Shawmut Mining Co. (C.C.A.) 159 F. 102; Reader v. Haggin (C.C.A.) 160 F. 909; Worden v. Kenny (C.C.A.) 239 F. 131; Ford Motor Co. v. Hotel Woodward Co. (C.C.A.) 271 F. 625; Harison v. U. S. (C.C.A.) 7 F. (2d) 259. The books are full of similar cases in other circuits too numerous to cite, in many of which the reason given was that the order was

discretionary, and which apparently implied that there might be a review if the aggrieved party could show that the discretion had been abused. Acting upon this, in several cases orders refusing new trials because of the amount of the verdict have been in fact reversed, though apparently in ignorance of the limitations in the dictum in Southern Ry. Co. v. Bennett. And so the gloss has become the supposed principle, and there has undoubtedly grown up a notion that in general there may be extreme cases where this is a good ground for appeal. However, so far as we have found, all the actual decisions except one, when this has been done, are either where the jury gave nominal damages, that is, where they did not attempt to appraise the plaintiff's loss at all; where their verdict was less than the amount of the loss which the defendant did not dispute; or where damages were not involved. In the first class is Pugh v. Bluff City Excursion Co., 177 F. 399 (C.C.A. 6) In the second are Glenwood Irrigation Co. v. Vallery, 248 F. 483 (C.C.A. 8); United Press Associations v. National Newspapers Association, 254 F. 284 (C.C.A. 8); and Stetson v. Stindt, 279 F. 209 (C.C.A. 3). In the third are James v. Evans, 149 F. 136 (C.C.A. 3), and Frye v. Lyon, 299 F. 926 (App. D. C.). All these are within the limits suggested in Southern Ry. Co. v. Bennett, and the exception, Cobb v. Lepisto (C.C.A.) 6 F. (2d) 128 (C.C.A. 9) so far as we can find, stands alone."

Although *Cobb* v. *Lepisto* may have been the only decision in conflict with *Miller* v. *Maryland Casualty Co.* in 1930, in the intervening years other Circuit Courts of Appeals have followed *Cobb* v. *Lepisto,* with the consequence that at the present time there is a clear conflict among the Circuit Courts of Appeals on the matter. Decisions of other Courts of Appeals in conflict with the decision of the Court below are:

Virginian Ry. v. *Armentrout,* 4 Cir., 166 F. (2d) 400;
Southern Pac. Co. v. *Guthrie,* 9 Cir., 180 F. (2d) 295, on rehearing 186 F. (2d) 926;

Trowbridge v. *Abrasive Co. of Philadelphia*, 3 Cir., 190 F. (2d) 825;
Bucher v. *Krause*, 7 Cir., 200 F. (2d) 576.[1]

Brief quotations from the opinions of the Courts in cases just cited will point up the conflict in their decisions and the decision of the Court below. Thus, in *Virginian Ry. Co.* v. *Armentrout, supra*, Judge Parker, speaking for the Court, said at pages 407-8:

> "And quite apart from the error in the charge, we think the trial judge erred in refusing to set aside the verdict as excessive and grant a new trial. Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in the discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience; and where a verdict is so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice, it is the duty of the judge to set it aside. Failure to do so is an

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[1] In addition to the direct conflict between the decision of the Court below and decisions of the Courts of Appeals for the 3rd, 4th, 7th and 9th Circuits, herein pointed out, reference to the decisions of the Courts of Appeals for the remaining Circuits reveals what appears to be a straddling position, since they cannot be definitely classified as adopting either side of the conflict. See Foley v. Capone Electrical Co., Inc., 1 Cir., 194 F (2d) 605; Sunray Oil Corp. v. Allbritton, 5 Cir., 187 F (2d) 475, on rehearing, 188 F (2d) 751; Sebring Trucking Co. v. White, 6 Cir., 187 F (2d) 486; St. Louis Southwestern Ry. Co. v. Ferguson, 8 Cir., 182 F (2d) 949; Smith v. Welch, 10 Cir., 189 F (2d) 832. The position of the Court of Appeals for the District of Columbia is clearly in conflict with the decision of the Court below. Boyle v. Bond, 187 F. (2d) 362. An excellent review of the conflicts in the opinions of the Courts of Appeals may be found in 6 Moore, Federal Practice § 59.08(6), pp. 3834-41 (2nd Ed. 1953). The author at p. 3829, *supra*, regards the better rule to be that the record should be reviewed on appeal and the lower court reversed if abuse of discretion is found in a denial of a new trial for excessiveness or inadequacy of damages.

abuse of discretion, analogous to error of law, and as such reviewable on appeal."

* * * * * *

"The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under section 22 of the Judiciary Act of 1789, 28 U.S.C.A. § 879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439. We do not understand the rule to have application, however, in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion."

In *Southern Pacific Co.* v. *Guthrie*,[2] Judge Pope, speaking for a majority of the Court, said:[3]

"There is an abundance of authority in the decisions of the federal courts that in this situation an appellate court has no power to do anything about such a verdict. The view most commonly expressed is that stated by Judge Goodrich, for the Court of Appeals of the Third Circuit, in Scott v. Baltimore & O. R. Co., supra, as follows: 'The members of the Court think the verdict is too high. But they also feel very clear that there is nothing the Court can do about it. * * *'"

* * * * * *

[2] 9 Cir. 180 F (2d) 295.

[3] *Id.* at 304.

"* * * On the other hand, in Cobb v. Lepisto, 9 Cir., 6 F. 2d 128, this court remanded a case with directions to order a new trial unless an excess amount, stated by this court, were remitted. In Department of Water & Power of City of Los Angeles v. Anderson, 9 Cir., 95 F. 2d 577, while finding the verdict there in question not to be 'grossly excessive', this court stated the rule of Cobb v. Lepisto to be as follows, 95 F. 2d at page 586: 'Although it was held in Southern Ry. Co. v. Montgomery, 5 Cir., 46 F. 2d 990, 991, that a Circuit Court of Appeals has 'no jurisdiction to correct a verdict because it is excessive,' the rule in this court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive' '. In Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, the Court of Appeals for the Fourth Circuit, reversed the judgment and ordered a new trial in a personal injury case because of its determination that the verdict was excessive notwithstanding the trial judge had denied a motion for new trial made upon this ground. The court cited Cobb v. Lepisto, supra, with approval and said: 'To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. * * * 'The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. * * *[15] (166 F. 2d 408)"[4]

[15] Cobb v. Lepisto, supra, prior to the decision in Virginian Ry. Co. v. Armentrout, supra, has been stated to stand alone. See Miller v. Maryland Casualty Co., 2 Cir. 40 F. 2d 463. Cf. Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, footnote 14, page 485, 53 S. Ct. 252, 255, 77 L. Ed. 439. It dealt with a verdict in an action to recover the value of services rendered, something more readily calculated than the compensation for pain, suffering, and the like.

"Southern Railway Co. v. Bennett, supra, and the earlier cases asserting want of power to review the action of the trial court in denying a new trial on the ground of excessiveness of the verdict, were explained by Judge Learned Hand in Miller v. Maryland Casualty Co., 2 Cir., 40

[4] *Ibid.*

F. 2d 463. The rule is there said to be based upon a procedural difficulty in that historically the writ of error did not afford review of the trial court's action upon a motion for a new trial, and it was said that the appeal later provided for was subject to the same limitations. Subsequently in Fairmount Glass Works v. Coal Co., 287 U.S. 474, 482, 53 S. Ct. 252, 254, 77 L. Ed. 439, the Supreme Court expressly referred to the decision in Miller v. Maryland, supra, saying: 'It has been suggested that a review must be denied because of the historical limitation of the writ of error to matters within the record, of which the motion for a new trial was not a part. Compare Judge Learned Hand in Miller v. Maryland Casualty Co. (2 Cir.), 40 F. 2d 463. But the denial of review can no longer rest upon this ground, since the record before the appellate court has been enlarged to include in the bill of exceptions a motion for a new trial, made either before or after judgment.' "

Speaking only for himself, Judge Pope, went on to say:

"The writer of this opinion thinks that this court should remand this case with directions to grant a new trial unless the appellee shall file his consent in writing to remit from the judgment now entered the sum of $20,000 together with all interest, if any, which may have accrued upon the amount so remitted."[5]

* * * * * *

"* * * He is of the opinion that a disclaimer of appellate power such as that stated in Scott v. Baltimore & O. R. Co., supra, is a manifestation of a momentum generated in the earlier cases, and not yet arrested simply because the courts expressing this doctrine have failed to note that the procedural obstacles which originally prevented apellate review no longer exist, as was stated in the Fairmount Glass Works case, supra, note 15.[16] In his opinion the doctrine of impotence expressed in the cases mentioned is due for a general overhauling and he thinks that the decision of Judge Parker in Virginian Railway Co. v. Armentrout, supra, points to the reasons why this court should not abdicate the power which it has previously asserted in Cobb v. Lepisto, supra, and Department of Water & Power v. Anderson, supra.[17]"[6]

"[16] Rule 75 of the Federal Rules of Civil Procedure relating to the record on appeal, is even more inclusive than the bill of exceptions referred to in the Fairmount Glass Works case. In the field of criminal appeals the Supreme Court in Griffin v. United States, 336 U.S. 704, 69 S. Ct. 814, noted no procedural difficulty in reviewing the trial court's

[5] *Id.* at 305.

[6] *Ibid.*

action upon a motion for a new trial notwithstanding the earlier disclaimers of authority in cases such as Blitz v. U. S., 153 U.S. 308, 14 S. Ct. 924, 38 L. Ed. 725. Cf. National Bank of Commerce v. U. S., 9 Cir., 224 F. 679, 683. The rational explanation is to be found in Rule 39(b), Federal Rules Criminal Procedure, 18 U.S.C.A. incorporating the rules and practice governing civil appeals."

"[17] Cf. Pacific Greyhound Lines v. Rumeh, 9 Cir., 1949, 178 F. 2d 652, in which this court considered at length the question whether the verdicts there were excessive."

It is significant that after its decision in *Southern Pac. Co.* v. *Guthrie, supra,* the Ninth Circuit Court of Appeals granted the appellant in that case a rehearing on the question of "whether the damages are excessive, and if so, what the action of the Court should be." 186 F. (2d) 926.

In *Trowbridge* v. *Abrasive Company of Philadelphia,*[7] the Court speaking through Judge Staley said:

> "We need not decide, however, whether the verdict is excessive, for this court will not substitute its judgment for that of the jury or the trial court. The question of excessiveness of a verdict is primarily one for the trial court; where, however, the verdict is grossly excessive, the denial by the trial court of a motion for a new trial constitutes such an abuse of discretion that this court will remand the cause for a new trial.[10] *A careful study of the evidence of damages in the record has failed to convince us that the verdict was so grossly excessive as to justify reversal on this ground."*[8] (Emphasis supplied)

"[10] Dubrock v. Interstate Motor Freight System, 3 Cir., 1944, 143 F. 2d 304; Virginian Ry. Co. v. Armentrout, 4 Cir., 1948, 166 F. 2d 400; Kos v. Baltimore & O. R. Co., 6 Cir., 1928, 28 F. 2d 872; Spero-Nelson v. Brown, 6 Cir., 1949, 175 F. 2d 86; Southern Pac. Co. v. Guthrie, 9 Cir., 1951, 186 F. 2d 926. This rule is in accord with the implication of the Supreme Court in Affolder v. New York, C. & St. L. R. Co., 1950, 339 U.S. 96, 101, 70 S. Ct. 509, 94 L. Ed. 683."

In *Bucher* v. *Krause,*[9] the Ninth Circuit Court of Appeals, through Judge Lindley, reviewed the precise question presented by this Petition, as follows:

[7] 3 Cir., 190 F. (2d) 825.

[8] *Id.* at 830.

[9] 9 Cir., 200 F. (2d) 576.

"Specifically, we are interested here in the extent, if any, to which the exercise of this discretion is reviewable by an appellate court. An old procedural impediment forbidding review of an order denying a motion for new trial no longer bars judicial review. See Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 482, 53 S.Ct. 252, 77 L.Ed. 439; Wetherbee v. Elgin, Joliet & Eastern Ry. Co., supra; Rule 75, Fed. Rules of Civ. Proc. 28 U.S.C. However, the underlying reason for the former controlling rule was not always clearly stated, with the result that generalizations to the effect that appellate courts may never review an order denying a motion for new trial were contained in many opinions. See Chicago & N. W. Ry. Co. v. Green, 8 Cir., 164 F. 2d 55; Chicago N. W. Ry. Co. v. Kelly, 8 Cir., 74 F. 2d 31.

"Indeed, there are still some comparatively recent decisions denying the right to review the exercise of the trial court's discretion. Scott v. Baltimore & O. R. Co., 3 Cir., 151 F. 2d 61; McCoy v. Cate, 1 Cir., 117 F. 2d 194. Some of these cases appear to reach the rather astounding conclusion that there is no power to review an alleged abuse of the lower court's discretion. Recognizing the emasculatory effect of such a doctrine on their reviewing function, some courts have resorted to 'accepted' bases of review. Thus, in Earl W. Baker & Co. v. Lagaly, 10 Cir., 144 F. 2d 344, 154 A.L.R. 1098 and Snowden v. Matthews, 10 Cir., 160 F. 2d 130, the court indicated that passion and prejudice on the part of the jury could, in the case of an excessive verdict, be inferred from the enormity of the sum awarded. This court has rejected such a rationale. See Wetherbee v. Elgin, Joliet and Eastern Ry. Co., supra and cases there cited. Another inventive process offered to justify review is found in Sinclair Refining Co. v. Tompkins, 5 Cir., 117 F. 2d 596, wherein it was held that any large verdict will always impel a careful search of the record for prejudicial error. Such an approach we think is misleading, for the existence or non-existence of procedural error in the trial of a cause should seldom be decisive of the propriety of the size of the verdict.

> "There are, however, many decisions of relatively recent date, with which we find ourselves in accord, which meet head on the problem at hand and conclude that a court of review may, with propriety, ascertain whether the trial court abused its discretion in failing to grant a new trial because of an excessive verdict. Cobb v. Lepisto, 9 Cir., 6 F. 2d 128; Southern Pac. Co. v. Guthrie, 9 Cir., 180 F. 2d 295, on rehearing, 9 Cir., 186 F. 2d 926, certiorari denied 341 U.S. 904, 71 S.Ct. 614, 95 L. Ed. 1343; Covey Gas & Oil Co. v. Checketts, 9 Cir., 187 F. 2d 561; Virginian Ry. Co. v. Armentrout, 4 Cir., 166 F. 2d 400, 4 A.L.R. 2d 1064; see also, Trowbridge v. Abrasive Co. of Philadelphia, 3 Cir., 190 F. 2d 825, 830; Consumers Power Co. v. Nash, 6 Cir., 164 F. 2d 657, 660; dissenting opinions of Judge Holmes in Sunray Oil Corp. v. Allbritton, 5 Cir., 187 F. 2d 475, on rehearing 188 F. 2d 751. These decisions, we believe, are representative of the correct view with respect to appellate authority to review the trial court's discretion. If that discretion be abused, this court will not be powerless to act."[10]

The Court below attempted to reconcile its decision with Judge Lindley's analysis in *Bucher* v. *Krause, supra,* by asserting that its affirmance of the District Court after exhausting its limited power of review was consistent with the "holding" of *Bucher* v. *Krause,* which likewise affirmed the trial court's denial of a new trial on the grounds of excessive damage. But the significant difference between the two decisions and the reason they are in conflict is that the Court of Appeals in the *Bucher* case affirmed the District Court after it had reviewed the claim of excessiveness in the light of all the record facts bearing upon the issue of compensatory and punitive damages, whereas the Court below refused to consider whether the record facts in this case bearing on special and punitive damage could, as a matter of law, justify the amount of damages that had been awarded. The appellant in *Bucher* v. *Krause* obtained from the Court of Appeals the review which Petitioner requested but did not obtain from the Court below.

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[10] *Id.* at 586.

It is respectfully submitted that the Court below was in error in restricting the character of review afforded Petitioner and that the conflicting decisions in the 3rd, 4th, 7th and 9th Circuits, cited above, should be accepted by this Court as expressing the proper function and duty of a federal appellate court.

2. The status of the law on the issue presented by this Petition is unsettled not only because of conflicts in the decisions of different Courts of Appeal, but also because of the various interpretations that have been placed on the statement of this Court in *Affolder* v. *New York, Chicago and St. L. RR. Co.*, 339 U.S. 96 at page 101. In that case this Court said:

> "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."

It would logically follow from the foregoing statement that this Court is of the opinion that it is appropriate for a Court of Appeals to consider and pass upon the question of whether the amount of damages awarded by a District Court is excessive in the circumstances of the particular case. The *Affolder* case came to this Court from the Court of Appeals for the 8th Circuit. The question was next considered by the 8th Circuit Court of Appeals in *St. Louis Southwestern Railway Company* v. *Ferguson*, 8 Cir. 182 F. (2d) 949. The 8th Circuit Court of Appeals characterized the above-quoted statement of this Court in the *Affolder* case as "dictum" and pointed out that this Court was in error in implying that the Court of Appeals had considered the question of excessiveness of the judgment when it reviewed the *Affolder* case. 182 F. (2d) at page 955.[11]

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[11] Although intimating that it should not consider the "dictum" of this Court controlling until a clearer expression of the law had been announced, the 8th Circuit Court of Appeals in *St. Louis Southwestern Ry. Co.* v. *Ferguson, supra*, reluctantly considered whether there had been an abuse of discretion by the trial court in refusing to set aside a verdict for excessiveness, 182 F. (2d) 949, at page 955.

The Court below in the instant case gave no weight at all to the above-quoted statement of the Court in the *Affolder* case. It disposed of Petitioner's contention as follows:

> "The appellant suggests that appellate power to review a verdict for alleged excessiveness was recognized in a dictum in *Affolder* v. *New York*, and *St. Louis RR Co.*, 339 U.S. 96—a decision in 1950 which reversed on another ground a decision by the Court of Appeals for the Eighth Circuit. But the Eighth Circuit Court of Appeals when the question was next before it, did not read *Affolder* as so holding, *St. Louis Southwestern Ry. Co.* v. *Ferguson*, 8 Cir. 182 F. (2d) 949, and we agree."[12]

With all deference, it is submitted that the Court below misread the opinion of the Eighth Circuit Court of Appeals in *St. Louis Southwestern Ry. Co.* v. *Ferguson, supra.* That opinion leaves no doubt that the Eighth Circuit Court of Appeals correctly read the "dictum" of this Court in *Affolder* as recognizing appellate power to review a verdict for alleged excessiveness. What the Eighth Circuit Court of Appeals said was that the Supreme Court had misread the opinion of the Court of Appeals in *Affolder.* But whether or not the Court of Appeals in the *Affolder* case had passed upon the question of whether the amount of damages awarded by the District Court was excessive in the circumstances of that case, it is perfectly apparent that this Court did consider and decide that question. If it was proper for this Court to review the judgment in *Affolder* for alleged excessiveness, it must follow that the Court below was in error in holding that it was without power to afford Petitioner such a review of the judgment of the District Court.

Courts of Appeals in other Circuits have not construed the opinion of this Court in the *Affolder* case as did the Court below. On the contrary, they have read the opinion as confirming not only the power but also the duty of a Court of Appeals to consider an assignment of error based

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[12] Appendix, p. 13.

upon the excessiveness of the amount of damages awarded by the District Court. Thus in *Southern Pac. Co. v. Guthrie, supra,* the Ninth Circuit Court of Appeals stated:

"Even if there had been any previous reason for doubt on this question, it would seem to have been put to rest by the statement of the Supreme Court in Affolder v. New York, Chicago & St. L. R. Co., 339 U.S. 96, 70 S.Ct. 509, decided after this court's former opinion in this case. There 339 U.S. at page 101, 70 S.Ct. at page 511, the court said of the claimed excessiveness of the verdict: 'We agree with the Court of Appeals (8 Cir., 174 F. 2d 486) that the amount of damages awarded by the District Court's (79 F. Supp. 365) judgment is not monstrous in the circumstances of this case.' This language would be without point unless the Supreme Court was of the opinion that it might do something about the excessiveness of the verdict if its amount could be called 'monstrous'. This is not, we think, substantially different from our statement in the Department of Water & Power case, supra, that 'the rule in this court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive.'"

"The statement made by the Supreme Court in the Affolder case has been drawn in question by the court whose decision was there reviewed. In St. Louis Southwestern Ry. Co. v. Ferguson, 8 Cir., 182 F. 2d 949, the court suggests that the language used by the Supreme Court discloses a mistaken assumption as to what the Court of Appeals had held. With apparent reluctance it recognized the possibility that the rule was as stated in the Affolder case, saying: 'It may be that a change in the rule is desirable, to allow a general review of the question of excessiveness, such as is the practice in many state appellate courts, or with a more restrained sense of responsibility, perhaps, to permit judgment to be passed upon whether there has been an abuse of discretion by the trial court in refusing to set aside a verdict on motion for new trial.' 182 F. 2d at page 955.

> "For the reasons previously stated, we think, contrary to what the Court of Appeals for the Eighth Circuit implied, that what was said in the Affolder case was foreshadowed in the Fairmount Glass Works case. In the face of this statement in the Affolder case we are not prepared to withdraw what this court said in Cobb v. Lepisto."[13]

A similar interpretation of this Court's holding in the *Affolder* case was adopted by the Seventh Circuit Court of Appeals in *Bucher* v. *Krause, supra,* at page 587.

3. The question presented by this Petition is one which goes to the very heart of our federal judicial system. One of the principal arguments justifying the system of discretionary review by this Court on petition for writ of certiorari is that all litigants in the federal courts are entitled to one appellate review on all questions of law by a Circuit Court of Appeals. Whether or not a District Judge abuses his discretion in denying a motion for new trial on the grounds of excessive (or inadequate) damages is a question of law, not a question of fact. Leaving the determination of such a question to the sole judgment and conscience of the trial judge is repugnant to theory and philosophy underlying the federal judicial system.[14]

Fortunately, in many of the Circuits, at the present time, a litigant in the federal courts is assured that he will receive at least one review by a federal appellate court of any judgment against him which he believes to be excessive. In the Second Circuit, however, unless the decision of the Court below is reversed, a litigant can obtain no relief from an arbitrary refusal by the Trial Judge to grant a new trial on the grounds that the evidence does not reasonably

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[13] 186 F. (2d) 931.

[14] See the learned exposition of the early law on this subject of appellate review for excessiveness or inadequacy of damages and the responsibility of the Court of Appeals on this question under existing law as contained in the dissenting opinions of Judge Holmes in *Sunray Oil Corporation* v. *Allbritton,* 5 Cir., 187 F. (2d) 475, 477, on rehearing 188 F. (2d) 751, 752.

support the amount of the verdict. Litigants in the federal courts of the Second Circuit, therefore, are deprived of review which is accorded to litigants in state courts and in many of the other federal circuits.

Moreover, a clear enunciation by this Court that Courts of Appeals of all Circuits have the power and duty under Section 2106 of Title 28, USC to afford a litigant relief from an excessive judgment for damages would go far to stop "forum shopping" in libel and other tort actions. The power to grant a new trial or to direct a remittitur of a portion of the damages as an alternative to a new trial, where the District Court has awarded excessive damages, must exist in the federal appellate courts if litigants who are sued in Federal Courts are to receive equal justice with those sued in State Courts. The case of *Covey Gas & Oil Company* v. *Checketts*, 9 Cir. 187 F. (2d) 561, is in point. There the Court, speaking through Chief Judge Denman, said (at p. 563):

> "This is a clear case of what is aptly called 'forum shopping.'[2] The identical case was brought in the state District Court of Idaho against the appellant and its employee Bowman, the truck's driver. A verdict for $40,000 was rendered against both defendants, which the trial judge set aside on the sole ground that it was excessive, and a new trial was ordered. The plaintiffs then dismissed the suit as to the appellant and brought the instant suit against it in the United States District Court, apparently seeking the decision of a judge who would sustain a larger award than the state judge.
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> "On the appeal in the Idaho suit, Checketts v. Bowman, 70 Idaho 463, 220 P. 2d 682, 684,[3] the state supreme court upheld the trial court's decision that the damages awarded were excessive but gave the plaintiffs the choice of a remittitur of the verdict's amount

"[2] Horowitz, Erie R.R. Co. v. Tompkins—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies, 23 So. Calif. L. Rev. 204, 215."

"[3] Decided after the order denying a new trial in the instant case."

to $20,000 as an alternative to the granting of a new trial. * * *

"* * * *

"* * * Following the language of the Idaho Supreme Court, the cause, is remanded with directions to the district court to enter judgment on the verdict for plaintiffs in the sum of $20,000, if within 30 days of the filing of the remittitur in that court the plaintiffs file a written consent to the reduction of the verdict and acceptance of judgment in the amount of $20,000, or in the event of plaintiffs' failure to file such consent, to order a new trial. The appellant is awarded its costs."

It is not without significance that respondent brought suit in the New York state court against News Syndicate Co., Inc., publishers of the Daily News in New York because it also had published the charges which respondent's wife had made in support of her motion for temporary alimony. The circulation of the Daily News was 2,100,000 and that of Petitioner's paper 105,000. Respondent recovered a verdict of $25,000 against the News Syndicate Co. *Stevenson* v. *News Syndicate Co., Inc.*, 302 N.Y. 81. It is likewise significant that no verdict for an individual, or a corporation, in the amount of $75,000 has ever been sustained on appeal in the courts of the state of New York. In the Court below, Petitioner marshalled the cases that had been decided in the New York appellate courts, which showed how essential the exercise of the power of the appellate court to reduce an excessive judgment or direct a new trial has been to the proper administration of justice. That such an avenue of relief would have been available to Petitioner had it been sued in the State Court is not open to question. *Evans* v. *Star Company*, 216 App. Div. 736, affirmed 243 N.Y. 626; *Crave* v. *Bennett*, 77 App. Div. 102; *Bishop* v. *New York Times Company*, 194 App. Div. 881, 214 App. Div. 723; *Van Siclen* v. *Bush*, 254 App. Div. 851, affirmed 279 N.Y. 753; *Foerster* v. *Ridder*, 275 App.

Div. 665; *Corrigan* v. *Bobbs-Merrill Co.*, 182 App. Div. 919; *McMahon* v. *New York News*, 51 App. Div. 448; *Gideon* v. *Daily Mirror, Inc.*, 263 App. Div. 807, affirmed 289 N.Y. 767; *Fleetwood Foundation, Inc.* v. *Daily Mirror, Inc.*, 243 App. Div. 687, affirmed 267 N.Y. 582; *Mogle* v. *Franz*, 267 App. Div. 423.

It is unnecessary for the purposes of this Petition to show here what the Court below refused to consider—namely that the evidence adduced by Respondent in support of its claim of special damages could not legally justify the award of $24,000 and that the circumstances surrounding the publication of the article complained of bearing on the question of whether any punitive damages should have been awarded, could not on any theory of the case justify an award of $50,000. Petitioner was entitled to have the Court below consider these contentions.

PRAYER

It is respectfully prayed that the writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment in this case, and upon such review reverse the judgment of the Court below and remand the case with instructions to afford Petitioner a review of its assignment of error that the District Court abused its discretion in denying a new trial on the grounds that the amount of special and punitive damages awarded was excessive.

Respectfully submitted,

WILLIAM J. DEMPSEY
Attorney for Petitioner

DEMPSEY AND KOPLOVITZ
938 Bowen Building
Washington 5, D. C.

McCAULEY AND HENRY
959 Eighth Ave.
New York, N. Y.
Of Counsel